Introduction to the Symposium

STEVEN D. SMITH*
LARRY ALEXANDER**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These first words of the First Amendment would seem to designate religion as a special category in constitutional law. While acknowledging this textual designation, however, some legal scholars have come to view the category as a product of historical contingencies of the late eighteenth-century; they have doubted whether persuasive contemporary justifications are available for giving special constitutional treatment to religion. (Or at least special *favorable* treatment: scholars have tended to be more approving of special constitutional *burdens* or *disabilities* imposed on religion under the Establishment Clause.)[1]

So, is there any good justification today for giving special constitutional treatment to religion? In March 2014 a select group of legal scholars gathered at the University of San Diego to discuss the question: "Is Religion Outdated (as a Constitutional Category)?" This Symposium collects some of the papers that were presented and discussed at that conference.

 Warren Distinguished Professor of Law, University of San Diego.

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1. For discussion of these developments, see STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 139–66 (2014).

I. ACCOMMODATING RELIGION?

Perhaps the most direct manifestation of the question is posed by the practice of presumptively exempting religious objectors from complying with laws that burden their exercise of religion. For decades, constitutional doctrine purported to command such accommodation;[2] although that doctrine was revised in the well-known Peyote case,[3] presumptive accommodation is still required under statutes such as the Religious Freedom Restoration Act, applied last term in the controversial *Hobby Lobby* decision.[4] Moreover, the Supreme Court's much discussed decision two terms ago in the *Hosanna-Tabor* case[5] indicated that religious institutions may still enjoy a constitutional right to be exempted from some statutes.

Several of the papers in this Symposium develop a skeptical position with respect to religious accommodation. Winnifred Fallers Sullivan articulates two main objections.[6] First, she doubts that the term "religion" describes any manageable or coherent category of human activities. The difficulty has often been noted, but Sullivan thinks the problem has become even more intractable "given the compromised genealogy of the term and the wildly diverse social and cultural objects that have been and might be termed religious."[7] Second, she argues (as do other contributors to the Symposium) that exemption of actors deemed "religious" from general legal obligations violates constitutional commitments to equality. Sullivan directs especially sharp criticism against the claim that institutional religious actors, or "the church," are deserving of special constitutional solicitude.

Some of these objections are reiterated in the article by Maimon Schwarzschild. But Schwarzschild primarily articulates a different concern—that exempting religious believers and institutions will aggravate the political fragmentation or "balkanization" that he perceives in the contemporary world.[8] Schwarzschild also explains how legal accommodation can encourage more extreme or fanatical actors to achieve domination of religious groups. "Extensive religious autonomy, in short, can lead to the creation—with state approval—of islands of

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2. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).
3. Emp't Div. v. Smith, 494 U.S. 872 (1990).
4. Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014).
5. Hosanna-Tabor Evangelical Lutheran Church and Schoolv. EEOC, 132 S. Ct. 694 (2012).
6. Winnifred Fallers Sullivan, *Why Distinguish Religion, Legally Speaking?*, 51 SAN DIEGO L. REV. 1101 (2014).
7. *Id.* at 1101.
8. Maimon Schwarzschild, *How Much Autonomy Do You Want?*, 51 SAN DIEGO L. REV. 1085, 1091 (2014).

authoritarianism in an otherwise free and democratic society."[9] Schwarzschild concludes by suggesting that religious individuals and institutions would be well advised to focus on limiting governmental power rather than on gaining legal exemptions.

In an unusually personal essay,[10] Frederick Mark Gedicks challenges one occasionally expressed rationale for giving special treatment to religion—that religion provides humans with "meaning." Reflecting on a family tragedy, Gedicks suggests that religion is not the exclusive or most important source of "meaning" in life.

In contrast to these articles, Christopher Eberle makes a case for special treatment of religion.[11] Eberle's contribution is primarily a careful, critical assessment of a widely discussed book opposing special treatment of religion—Brian Leiter's *Why Tolerate Religion*? Toward the end of his essay, however, and growing out of his criticisms of Leiter, Eberle sketches both a secular and a religious or "Augustinian" rationale for accommodating religion. Contrary to a common assumption, Eberle suggests that both the secular and the religious rationales should count in public deliberations: if civility and mutual respect entail that religious citizens should offer reasons that address their secular neighbors, it equally follows that secular citizens should offer reasons that speak to their devout fellow citizens.

II. RELIGION AND/OR CONSCIENCE?

In a wide-ranging exploration, William Galston contends that religion is not like other mundane interests and that, for believers, religion is more than a matter of mere "flourishing."

> There are . . . two features of religion that figure centrally in the debate about religiously-based exemptions from otherwise valid laws. First, believers understand the requirements of religious beliefs and actions as central rather than peripheral to their identity; and second, they experience these requirements as authoritative commands. Regardless of whether an individual experiences religious requirements as promoting or rather thwarting self-development, their power is compelling.[12]

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9. *Id.* at 1098.

10. Frederick Mark Gedicks, *Religion, Meaning, Truth, Life*, 51 SAN DIEGO L. REV. 1069 (2014).

11. Christopher J. Eberle, *Religion and Insularity: Brian Leiter on Accommodating Religion*, 51 SAN DIEGO L. REV. 977 (2014).

12. William Galston, *Religion, Conscience, and the Case for Accommodation*, 51 SAN DIEGO L. REV. 1045, 1059 (2014).

This linkage of personal identity to dual authorities provides a rationale, Galston argues, for giving special constitutional protection to religion. However, these two features are not unique to religious believers; some secular citizens experience a similar conflict of duties or authorities. Thus, Galston applauds the Supreme Court's well known decisions from the Vietnam War period[13] exempting conscientious but not conventionally religious objectors from serving in the military.[14]

In this respect, Galston arrives at a position that other jurists and scholars have favored: constitutional protection should be extended not to *religion* per se, or at least not only to religion, but rather to *conscience*, with religion benefitting as a sort of (sometimes) lesser included sub-category. In this Symposium, this position is debated by Micah Schwartzman and Andrew Koppelman. In earlier writings, Schwartzman had suggested that religion should not be deemed constitutionally special, but that special protection might permissibly be given to conscience.[15] In his essay in this volume, Koppelman criticizes this position,[16] arguing that *religion* holds a special place in the American constitutional tradition and that this position is justifiable because religion is a good proxy for a range of important values. Conscience is one of those values—but hardly the only one.

Schwartzman responds[17] by acknowledging that "religion" and "conscience" are overlapping but not coextensive categories. Some human interests fall under the head of religion but not of conscience; others belong to conscience but not to religion. It follows that accommodating only religion will leave some claims of conscience unprotected. Such treatment is unfair, Schwartzman argues, violating constitutional commitments to equality. This unfairness can be avoided, he maintains, by legally accommodating both religion and conscience.

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13. Welsh v. United States, 398 U.S. 333 (1970); Seeger v. United States, 380 U.S. 163 (1965).

14. Commenting on Galston, Larry Alexander identifies a number of questions that Galston's article raises. In particular, Alexander focuses on the problem of justifying "toleration of error," and he suggests but does not endorse several possible responses to that problem. Larry Alexander, *Galston on Religion, Conscience, and the Case for Accommodation*, 51 SAN DIEGO L. REV. 1065 (2014).

15. *See, e.g.*, Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. Chi. L. Rev. 1351 (2012).

16. Andrew Koppelman, *"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 SAN DIEGO L. REV. 1079 (2014).

17. Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085 (2014).

III. QUESTIONING THE QUESTION

Commenting explicitly on Schwartzman but implicitly on the other authors as well, Stanley Fish suggests that scholars and jurists are asking whether "religion" is "special" by reference to some nonreligious value or framework. But to frame the question in this way is already to miss the essential point—that religion is special precisely because it refuses to be subordinated to any supposedly more primary or encompassing value or framework. Rather, religion holds itself out as a totalizing, encompassing ontological and normative framework. Nothing else is comparable.

> To put the point as baldly as possible, there is not, and could not be, any parallel between religious beliefs and the beliefs that make up what Schwartzman calls the "secular claims of conscience." As propositions about the world and your relation to it, they are entirely different animals. The assertion that they are "comparable" or "functionally equivalent" can only be made to work if what is distinctive, that is, special, about religion . . . is regarded as a quaint but now annoying relic of an age of superstition, while the true essence of religion is identified with whatever in its teachings can be squared with liberal rationalism. Then you can say that religion is not special because the specimen laid out on your dissecting table has had the heart cut out of it.[18]

Conversely, if we attend to what religion really is, or claims to be, we arrive at a different conclusion.

> Being special is the business religion is in. And as it so happens it is a business recognized by the Constitution. So specialness is validated all around. End of story, end of argument. Not, however, the end of the political problem, which is what to do with a discourse marked as special by the Constitution, as well as by its own claims, in a society where the value of obedience to a revered authority is held in slight regard and has been replaced by the values of equal treatment, fairness and human flourishing—Or so it would seem if you spend most of your life in elite law schools.[19]

IV. CONCLUSION

Whether religion is or should be constitutionally special is a question that has been with us for a good long time, and it promises to provoke debate for a long time yet. The diverse perspectives articulated in this Symposium represent a valuable contribution to that debate.

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18. Stanley Fish, *Where's the Beef?*, 51 SAN DIEGO L. REV. 1037, 1042 (2014).
19. *Id.*